

REQUEST FOR REVIEW of a Decision of the Universal Service Administrator

Date: March 26, 2012
RE: DOCKET NO.: 02-6 and 96-45
Petitioner Name: Akisha Networks, Inc (SPIN: 143025681)
Name of Letter: Notification of Commitment Adjustment Letter
Funding Request No(s): 1745678
Billed Entity Name: HOUSTON HEIGHTS LEARNING ACADEMY
Form 471 Number: 599288
Billed Entity No: 227737
FCC Reg. No: (Not present on received USAC documentation)
CC Docket: No. 02-6 and 96-45
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INTRODUCTION

USAC Funding Commitment Adjustment Explanation (FCAE): *"After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of the review, it was determined that the applicants consultant who was involved in determining the services sought by the applicant and the selection of the applicants service providers is associated with a service provider who was selected. The consultant responsible for the content of the FCC Forms 470, who also has input into the entity's technology plan, has a contractual relationship with Akisha Networks, Inc, in which he is paid a sales commission. The consultant's statement that the bid from Akisha Networks, Inc was the only bid received does not mitigate this conflict of interest. Therefore the competitive bidding process used to establish the funding request was not a fair and open competitive bidding process free from conflict of interest. FCC rules require applicants to submit a Form 470 to initiate the competitive bidding process, and to conduct a fair and open process. Neither the applicant nor the applicants consultant should have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow it to unfairly compete in any way. Since the applicants consultant has engaged in an improper relationship with a selected service provider, which represents the conflict of interests and compromises the competitive bidding process, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the service provider."*

In addition, during the course of the review, it was determined that the funds were erroneously committed for the funding request 1745678, which was not justified as cost effective. The FCC rules require that, in selecting the service provider, the applicant must select the most cost effective service or equipment offering, with price being the primary factor, which will result in it being the most effective means of meeting educational needs and technology plan goals. Additionally, the applicants technology plans for requested services should be based on an assessment of their reasonable needs. Applicants that request services that are beyond their reasonable needs and thus not cost effective have violated the above rules. Sine FRN 1745678 exceeded the applicants reasonable needs, this funding commitment is rescinded in full and USAC will seek recovery of any improperly dispersed funds from the service provider.

PETITIONERS RESPONSE

The above FCAE asserts the following: *The bid process was not “open and fair” because the consultant had knowledge of the applicant tech plan, assisted with the construction of the Form 470, AND had a contractual relationship with the selected service provider. This constituted a conflict of interest and therefore compromised the competitive bidding process.* In submitting our bid to the above entity, we believe that we acted in full compliance with both the letter and spirit of USAC’s policies and procedures. Though it is true that we had a contractual relationship with the applicant consultant cited in the above FCAE, that relationship was not related to E-Rate business and in no way affected the fairness of the bid process. USAC’s assertion that it did is circumstantial at best and, at worst, a complete misinterpretation of the facts. It is our opinion that the language that USAC compliance officer uses to describe a “fair and open competitive bidding process” combined with other misapplied USAC policies and procedures, has led USAC compliance officers to wrongly target Akisha Networks.

Competitive Bid Process

USAC policy dictates that each Form 470 must fully describe the products and services desired by the applicant. A cursory search of posted Form 470’s from funding year 2008 and funding year 2011 yield the following service descriptions:

“distance learning circuits -- modern services to three classrooms”

“wireless internet access designed for portable electronic devices including email and text msg”

“Email Server - 2 servers”

The above descriptions clearly violate the USAC edict that *“Such generic or encyclopedic requests will inhibit service providers from composing a responsive bid without additional information or insight into the applicant's bid solicitation.”* Our company does not consider these types of descriptions to be atypical. In fact, we expect them and have built our E-Rate practice around helping schools clarify these vague requests and polish them into a set of integrated solutions that meet all their tech plan goals and objectives. However, in order to fashion a bid from this starting point requires an in-depth understanding of not only the environment but of the products and services we would bring to bear. Therefore, we target schools that 1) are geographically close so that we can meet with them several times, 2) are likely to receive the 90% discount rate so that we recover our investment of time and do not place an undue burden on the school’s limited resources, and 3) require the products and/or services that are in our “sweet spot” of expertise so that we can produce high quality results for the lowest possible price. Obviously, if we are doing our job, we will gain “competitive advantage” over other service providers that cannot deliver this level of attention to the process. Our bid will clearly be based on information that other service providers, who may only contact the applicant via phone, or worse, submit a bid based solely on the vague and sparse content contained within the Form 470, are not privy to. **We assert that our actions did not violate any USAC or FCC policy or rule, instead, a normal business practice has been improperly interpreted by UASC compliance officers.**

The FCAE implies, because the applicant only received one bid (ours) that the consultant must have tainted the process in favor of Akisha Networks, **This is patently untrue** and we challenge USAC to prove otherwise. There are numerous reasons why an applicant would only receive one (or no) bids during the time that the Form 470 is posted to the USAC website. We'll list only a few examples:

- **The Form 470 search mechanism is abysmal** and severely limits the ability of service providers to find applicants who desire products or services that match the competency of the service provider. One cannot search based on any type or free form keyword or even within the description field of the Form 470. If you can't find it, you can't bid on it.
- As previous mentioned, **applicants are not required to be specific when they submit their Form 470**. Service providers must not only wade through hundreds of poorly implemented online Form 470's, but they have to be able to interpret the meaning of the requests. Since applicants are typically not skilled in technical interpretation of their tech plans (and no one is allowed to assist them), the result are descriptions that either don't make sense or are so vague as to be worthless. It doesn't take a big leap in logic to see why a service provider would skip an undecipherable Form 470 in favor of one that is specific.
- **There is no "standard" bid process**. USAC only provides guidelines for conducting an "open and competitive bid process" but other than posting the Form 470 to the USAC website and waiting for service providers to call, there **is no required standard procedure**. Many schools do not have the resources to conduct a full-blown, public RFP-driven, blind-submission bid process. Most small schools have never conducted any type of evaluative bid process; they just go with who they know or who they are comfortable with. USAC gives no specific procedures or assistance with conducting the type of bidding process they favor but, amazingly, have installed a passive bid process that requires no active input by the applicant other than to wait 28 days for bid submissions before choosing the most appropriate bid(s) for Form 471 submission.
- **The bidding process does not lend itself to efficient service provider bid submission**. Many schools engage the E-Rate process because they need much more than the one-off server or wireless access point. Many need an entire suite of integrated products and services that will quickly bring their facilities up to par. Unfortunately, schools do not know how to properly combine the hundreds of product and service categories listed on the Eligible Services List into a cost effective, integrated solution. USAC is asking unskilled and unprepared school administrators to manage bids from disparate service providers, disseminate the correct information to dependent service providers (e.g. a provider of server hardware needs to know what software will be running on the hardware to give proper specifications), properly assess the value of related service provider offerings, while simultaneously making sure educational objectives are properly incorporated and disseminated to all parties. Given the limited time frame service providers have to submit bids into this type of environment, they must either A)

“shotgun” the same cookie-cutter bid to many schools in the hope that one of them will “stick” or B) target a few high-need schools and custom design a bid for each one.

Given the above circumstances, small or rural schools receiving more than one bid is more likely the exception than the rule. If this is not obvious in the data submitted to USAC, it’s probably because schools either tailor their scope around the incomplete bids they did receive or abandon the E-Rate process altogether. **We assert that it is not unusual for a school to receive one bid AND that the USAC rules do not prohibit this, so there is no relationship between the assertion that USAC makes in the FCAE and the stated outcome.** Also note that USAC could easily prevent the possibility of a “one-bid” submission by requiring applicants to submit more than one bid proposal with their Form 471 (e.g. applicant could submit the winning proposal along with two rejected proposals).

“Inside” Information

USAC’s policy dictates that consultants and/or service providers cannot have prior relationship or “inside” knowledge of an applicant’s situation in a way that “would allow it to unfairly compete in any way.” How then, does an incumbent service provider compete? Akisha Networks has done non-USAC related work in the education sector for many years. Over the years, we have become a trusted advisor to many schools, educators, and administrators who may apply for E-Rate funding in the future. **USAC’s current interpretation of its competitive bidding policy would preclude us from seeking any E-Rate work from the very clients that would benefit most from our services.** In addition, most small schools or districts (charter schools or rural school districts), do not have the resources to properly align technology solutions/bids to their educational/curriculum goals. When an entity hires a consultant, they are mostly relying on that person to use their technology knowledge and relationships to assist them in getting the best possible value out of their 10-20% E-Rate obligation. USAC’s policy seems to state that the school must do this task on their own, without any outside help. This is not only unrealistic; it is a potential waste of FCC funds, as unqualified school personnel attempt to evaluate products and services in which they have no expertise. **We assert that we acquired no “inside” information from our relationship with the consultant. All the information used to prepare our bid was gathered in the normal course of business (see the explanation of our process in the above “Competitive Bid Process” section).**

Prior B2B Relationships

The above FCAE asserts that the relationship between Akisha Networks and the consultant caused the bid process to be tainted. It implies that the relationship was created for the expressed purpose of manipulating the E-Rate bid process. **This is untrue.** Akisha Networks does most of its business outside of the E-Rate arena and it primarily uses independently contracted sales people to generate leads. It also has developed business relationships with many people in the education community. In the small educational community in which we concentrate our E-Rate activities, how do we “fairly” engage entities in which we have prior relationships? If we excuse

ourselves from participating in a bid for a particular school because of a prior relationship, doesn't that give an "unfair advantage" to other service providers that do not happen to have a relationship? **USAC policy does not attempt to address these issues, instead it seems to be applied arbitrarily in an attempt to somehow solidify a case already founded on a very weak premise.**

Funds "erroneously" committed

The FCAE asserts that funds committed to the school were not "reasonable" or "cost effective" for services rendered and therefore violate FCC rules. Obviously, we believe that the services we bid WERE cost effect AND reasonable otherwise we would have not proposed them. To design the services we proposed, we used the most current USAC Eligible Services List (ESL) document available. This is what the ESL says about the eligibility of services included in "maintenance contracts:"

"but for the maintenance at issue, the connection would not function and serve its intended purpose with the *degree of reliability ordinarily provided in the marketplace to entities receiving such services without E-rate discounts.*" (emphasis added)

The following maintenance services are eligible:

- Repair and upkeep of eligible hardware
- Wire and cable maintenance
- Basic technical support
- Configuration changes

In our opinion, nothing in our maintenance proposal violates the above. Due to the subjective nature of the terms "reasonable" and "cost effective" it would seem logical (to us) that if USAC deemed our proposal not reasonable or cost effective that they would have denied the funding request from the outset as required by the FCC. Instead, USAC approves the funding request, pays invoices for several months, and then during a post funding review, chooses to reverse itself, reinterpret our services as being unreasonable and not cost effective, and rescinds all funding (including funds for services already rendered). And, most incredibly, all the above was carried out without anyone from USAC contacting us.

USAC Audit Process

The USAC compliance audit process is severely flawed. It seems to presume that fraud, abuse, or some other form of subterfuge is the proper conclusion to every interpretation of the USAC rules. During the entire investigative process, Akisha Networks was never questioned by any USAC official, was never informed that an investigation was in progress (until we inquired why our invoices weren't being paid), and was allowed to continue to spend its resources in completing the ongoing e-rate project even though USAC knew the possibility existed that it may choose to not honor the contract. Even when we initiated an inquiry with an USAC

Ombudsman, we weren't given any information. When we asked the Ombudsman whether we should continue with the project or wait until the investigation concluded, we were told to continue with the project. Thinking that it would be best to continue to serve our customer, we continued with the project until cash flow considerations forced us to stop. Imagine our surprise when, many months later, we are informed by letter that not only would our outstanding invoices not be paid, but we would be required to reimburse USAC for funds already disbursed for work already completed! We are not lawyers here at Akisha Networks, but we cannot imagine that this policy in any way aligns with due process of the law. We are, quite literally, left "holding the bag."

Conclusion

We have faithfully executed our contractual obligations to USAC and to the school and now, it seems, that, without any opportunity to defend ourselves (other than this after-the-fact appeal process) **we have been found guilty of a policy violation interpreted by a person or persons who never once considered our point of view or asked us a question.** Our business has already suffered greatly due to having to absorb the costs associated with the unpaid invoices. If forced to reimburse USAC for work that has already been completed, our business will be severely crippled and may be forced to shut down.

We respectfully request that you reconsider your choice to rescind funding and render a favorable decision in support of our business.

Sincerely,



Ronald T. Smith
Akisha Networks, Inc.